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No. 83-207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE R. ARIYOSHI, WAYNE MINAMI, and HERBERT CHUN,
Petitioners,

v.

ROBERT L. PEKARSKY and ARNIE T. KOCH,
Individually and on behalf of all others similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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November 30, 1983

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Robert L. Pekarsky and Arnie T. Koch, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 695 F.2d 352 (9th Cir. 1982).

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Ninth Circuit properly upheld the District Court's determination of

the plaintiffs' [Respondents'] entitlement to attorneys' fees under 42 U.S.C. § 1988 in a civil rights action involving race and residency discrimination where plaintiffs, after class determination, had obtained by settlement substantially all of the relief sought in the amended complaint.

COUNTERSTATEMENT OF THE CASE

In December, 1976, the original complaint was filed against various state officials pursuant to 42 U.S.C. Sections 1981, 1982, 1983, 1985 and 1986, the Privileges and Immunities Clause, the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the Fourteenth Amendment to the United States Constitution. The gravamen of the complaint was that certain elected and appointed state officials had, beginning in August, 1974, utilized the state dental licensure examination illegally to discriminate against examinees based upon the racial and residential status of the examinees. The Defendants named therein were the Governor of the State of Hawaii, the Director of the Department of Regulatory Agencies, the Executive Secretary to the Board of Dental Examiners [Petitioners herein] and the members of the Board of Dental Examiners—all named in their official and individual capacities.

On October 14, 1977 Petitioners and the other Defendants filed a motion to dismiss and/or for summary judgment based in part upon an alleged lack of jurisdiction, an asserted failure to state a claim, the abstention doctrine and an alleged bar under the Eleventh Amendment.[1] At the hearing in December, 1977, the court rejected all of the State's claims, save failure to state a claim as to some Defendants and, as to that claim, the court

[1] During the initial phases of this litigation all Defendants, including Petitioners in both their individual and official capacities, herein were represented by the State of Hawaii Attorney General's Office. The basis for the alleged Eleventh Amendment bar was that as all of the defendants were state officials, this action was thus really and only against the State of Hawaii itself as the real party in interest, though now Petitioners take a different position.

permitted an amended complaint to be filed.

Respondents began extensive discovery efforts which were continued throughout 1977, 1978 and 1979. Concomitant with the filing of the interrogatories, the State Attorney General's Office began a systematic effort to frustrate discovery and delay litigation. The first obstructions and delays were caused when the State repeatedly refused to provide answers to interrogatories. Several motions to compel discovery were then filed by Respondents and granted by the court, at least one of which included an award of attorneys' fees against Petitioners' counsel.[2]

After substantial discovery had been ordered and completed, Respondents filed their Motion for Determination of Class in March, 1979. The question of class determination provoked an onslaught of legal work (the papers filed with the court by all counsel during March, April and May 1979 on the class issue alone exceeded 260 pages in length). On May 11, 1979 the court granted Respondents' motion for class determination.[3]

Immediately thereafter settlement negotiations relating to changes in the testing and licensing procedures were begun as a result of intervention by the trial court. Counsel met on nearly a *daily* basis through June, July and part of August,

[2] The State's objection to providing Respondents with the records of all dental licensure applicants led, for example, to a full-out discovery battle which lasted for nearly five months, before Respondents were ultimately successful.

Respondents filed requests for admissions of fact in February, 1979 based upon information extracted from copies of more than 11,000 pages of State dental licensing and examination records copies by them pursuant to other earlier orders compelling discovery. The purpose of the request for admissions was to verify the data base then entered on a computer system based upon statistical models designated by mathematicians also retained by Respondents as well as to narrow the issues for trial.

[3] Immediately following class determination, action was taken to further comply with Rule 23. Notices were sent by Plaintiffs' counsel to all members of the class. Extensive efforts were undertaken to ascertain the addresses of all class members. For class members that did not respond in writing, additional notices were sent.

1979,[4] resulting in extensive, fundamental changes in the procedure for licensing dentists in the State of Hawaii.[5]

Settlement of the damages issue occurred after a series of in-chamber conferences with the trial judge which began in the

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[4] By this time the members of the Board of Dental Examiners had retained private (insurance company) counsel to represent them. About 98% of the settlement negotiations, including all of the time spent on the revisions in the dental exam, *infra*, involved Respondents' Counsel and private counsel (not State Deputies Attorney General). Two separate interim stipulations and settlement documents were signed and effectuated covering these equitable matters.

The private law firms representing the Board of Dental Examiners Defendants (not Petitioners) were also interested in settling the damage claims and continued progress in this area also resulted solely from the efforts of these attorneys as the State was still opposed to the payment from government funds of any monetary sums to the named-plaintiffs and the approximately one hundred then determined class members, both in terms of damages and for attorneys' fees. Discussion of attorneys' fee was initially delayed for some time since under prevailing class action case law Plaintiffs were restrained from negotiating the attorneys' fees component contemporaneously with the class action monetary settlement. *Mendoza v. United States*, 623 F.2d 1338, 1352-53 & n. 19 (9th Cir. 1980); *Prandini v. Nat'l Tea Co.*, 557 F. 2d 1015 (3rd Cir. 1977).

[5] For example: examinees were now to be told in advance the subjects and testing procedures to be used and the criteria to be used in grading; evaluation sessions where graders met and subjectively altered actual test scores were eliminated altogether; a set of comprehensive, objective grading criteria was developed to replace the prior system of subjective analysis and which would now also include non-Dental Board members; these graders would be, for the first time, required to take professional training in testing and dental examination procedures; a double-blind, anonymous testing procedure was developed; examinees were allowed to learn the specific results of their exams, see the graders' worksheets and other material used in the exam process and an appeal procedure including a right of due process hearings was established where *no* procedure had existed before. The documentation for these changes consisted of dozens of pages of detailed instructions for each participant in the examination process from graders to the messengers to the proctors and everyone in between, as well as for each of the processes described above. Development of the procedures involved consultation and input from experts from several states.

Fall of 1979 and continued through the Summer of 1980.

On August 4, 1980, the last in a series of in-chambers conferences about the scope and details of the settlement agreement was held between the court and all parties. At this time, with the active participation of the court, settlement of $325,000 in damages was agreed to and a new agreement was reached with the State to enlarge the equitable relief already obtained[6] by having the State expunge the records of class members who had failed the examinations.

As a condition of settlement, it was stipulated by the parties, with the trial court's substantial involvement and express approval, that Respondents would accept the damage settlement offers then being tendered by the Board Member Defendants as total damages, and that all claims against those Defendants would be dismissed with prejudice. It was further stipulated among *all* parties (including Petitioners herein) that the Respondents would proceed solely against the State (Petitioners herein) for *all* attorneys' fees in the entire case and that therefore no damages would be sought from Petitioners.[7]

These final settlement terms, damages, expungement and reform of the State of Hawaii dental testing and licensing procedures were incorporated into the Stipulation and Agreement of Settlement, approved by the court on December 12, 1980 [Appendix I].

It is from the enforcement of the terms of this *mutual settlement agreement* that Petitioners sought review by the Ninth Circuit, and having failed there to convince that court to reinterpret this contract in their favor, that they again seek review.

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[6] This additional relief expanded that already contained in the interim stipulations. *See*, footnotes 4 and 5, *supra*.

[7] Because agreement could not be reached on the matter of attorneys' fees, the State agreed to have the trial court make the determination of the matter of attorneys' fees by agreeing to the inclusion of the express provision in the settlement document reserving the matter of attorneys' fees for determination, after hearing, by the District Court.

Pursuant to the Stipulation and Agreement of Settlement (Appendix I), Respondents' motion for attorneys' fees came on for hearing before the trial court. Prior to the hearing, the Petitioners noticed and took the oral depositions of two of Respondents' counsel and they were provided over one full month to review all of Respondents' files, records and time sheets.

The court reviewed the extensive memoranda and documentation submitted on the questions of plaintiffs' entitlement to and the amount of attorneys' fees and costs, heard oral argument and, after studied consideration of all issues and relevant case law, issued its 14 page "Order on Application for Attorneys' Fees" [Appendix C to Petition for Writ] awarding the four law firms representing plaintiffs attorneys' fees in the amounts of $113,271.87, $21,150.00, $11,852.31, and $6,458.40, and allowing $18,885.87 in costs to be paid by the State of Hawaii.[8]

In so doing the district court ruled that Respondents were prevailing parties under the terms of the settlement. It also found that significant benefits were conferred on the plaintiff class *and the public* through the reforms achieved solely as a result of Respondents' counsel's efforts, noting that the amount of claimed fees would have been less but for the stubborn and often unnecessary resistance offered by Petitioners' counsel.[9]

On February 10, 1981 Petitioners filed their notice of appeal to the Court of Appeals for the Ninth Circuit. On December 21, 1982, the court in interpreting the settlement agreement determined that an award of attorneys' fees against Petitioners was justified, since Respondents "did prevail against [Petitioners]",[10] but that a recalculation of the amount of the fee

[8] The court thus in effect disallowed more than $130,000 in requested fees and costs.

[9] *See*, footnote 16, *infra*.

[10] Appendix A to Petition for Writ at 4a. Even dissenting Judge Choy agreed that the Respondents were prevailing parties, although he used the qualifying label "technically" prevailed. Appendix A to Petition for Writ at 6a.

award must be made by the trial court. The Ninth Circuit expressly found that the issue was one of *interpretation of contract* [settlement agreement] in making its de novo review and determination, 695 F.2d 352, 354, 355 (9th Cir., 1982), [Appendix A to Petition for Writ at 3a].

The Ninth Circuit then denied Petitioners' petition for rehearing and suggestion for rehearing *en banc.*

REASONS FOR NOT GRANTING THE WRIT

1. *Petitioners have failed to show any grounds under Rule 17 of this Court and 28 U.S.C. § 1254 for granting the writ.*

In their Petition for Writ of Certiorari, Petitioners fail to even allege any proper grounds for review which meet the requirements of either Rule 17 or 28 U.S.C. § 1254 as required by this Court. Petitioners are required in an application for writ of certiorari to set forth the grounds which show this Court that:

> When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. [or]
>
> ***
>
> When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. [Rule 17.1(a) and (c) of Rules of the Supreme Court of the United States (1980)].

In their petition, Petitioners have not alleged that the court of appeals conducted itself improperly or rendered a decision which is contrary to any of the standards set forth under Rule

17 meriting review by the Court. The court of appeals in this case simply interpreted the terms of a court approved contract, *i.e.*, the Settlement Agreement reached among all the parties in the case, including Petitioners. This contractual interpretation does not, and did not, involve any overriding federal decisional or statutory law or any other grounds which could serve as a basis for review by this Court and understandably, Petitioners do not contend that it does. Indeed, even as alleged in the petition, the court of appeals' ruling affects only the three named State officials who are the named Petitioners here. As most generously interpreted, the petition simply complains that the court of appeals' decision is unfair or wrong from Petitioners' standpoint.

Likewise, Petitioners do not suggest, because they could not, that the court of appeals' decision is at odds with any decision of another court of appeals or with decisions of this Court. Only in passing, and quite indirectly, do the Petitioners refer to the Court's recent treatment, in *Hensley v. Eckerhart*, 76 L.Ed.2d 40, 103 S.Ct. 1933 (May 16, 1983), of the "prevailing party" standard for determining the amount of reasonable attorneys' fees under 42 U.S.C. § 1988 in a civil rights case such as the one at bar. Understandably, because they cannot, Petitioners do not argue that the appeals decision is at odds with the *Hensley* ruling. Because Petitioners have not even met the *prima facie* requirements of Rule 17 and 28 U.S.C. § 1254, the petition should be denied.

2. *The decision of the court of appeals is in harmony and follows decisional law of this Court.*

In recent years this Court has expressly and clearly resolved the proper interpretation and application of 42 U.S.C. § 1988 as that section permits the determination by lower federal courts as to who are "prevailing parties" and as to what standard the district courts must use in determining the amount of attorneys' fees awarded under that section. For example, in *Gagne v. Maher*, 448 U.S. 122 (1980), this Court ruled that the dis-

trict court had the broad discretion under 42 U.S.C. § 1988 to award attorneys' fees even though the case is resolved by settlement, consent judgment or other non-judicial resolution. This Court specifically approved of an award of attorneys' fees when that case was resolved by a consent decree where, in so doing, the parties had reserved the issue of attorneys' fees for future determination by the district court. *Gagne* was anchored in this Court's recognition of the need to encourage litigants to seek non-judicial resolutions of cases consistent with the congressional mandate set forth in 42 U.S.C. § 1988, *i.e.*, that attorneys' fees could be awarded in civil rights cases resolved voluntarily by the parties.

Further, in *Gagne*, this Court decided that entitlement to attorneys' fees under § 1988 was a completely distinct inquiry from the decision on the merits. Understandably this Court ruled that district courts must be accorded substantial discretion to determine whether litigants are "prevailing parties" and that the degree of success in obtaining the requested relief, as set forth in the complaint, was a factor in the district court's determination of entitlement to fees under § 1988.

In any event, recognizing that one result of parties' settling a case is that no decision on the merits is reached, this Court in *Gagne* decided that once the district court determined that a settling party seeking fees under § 1988 showed that the case asserted proper subject matter jurisdiction, *e.g.*, colorable federal constitutional and statutory claims under *Hagans v. Lavine*, 415 U.S. 523 (1974), then all other aspects of the case, including the success on the merits fall, within the district court's evaluation for purposes of determining an amount of fees. However, regardless of whether the trial court is making an assessment of: (1) the entitlement to fees, or (2) the amount of fees, the fee application must not become, or be used as, a second opportunity to try the merits.

More recently, in *Hensley v. Eckerhart, supra*, this Court reaffirmed and clarified the standards for district courts to use in determining the amount of attorneys' fees awardable under

42 U.S.C. § 1988. In *Hensley*, 76 L.Ed.2d at 50, 103 S.Ct. at 1939, this Court stated that:

> A plaintiff must be a "prevailing party" to recover an attorney's fee under § 1988. The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." This is a generous formulation that brings the plaintiff on or across the statutory threshold and it remains for the district court to determine what fee is "reasonable." [citations omitted].

The overriding lesson of the *Hensley* case was this Court's emphasis that:

> . . . the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where the plaintiff has obtained excellent results, his attorneys should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified . . . The result is what matters. [citations omitted] 76 L.Ed.2d at 51-52, 103 S.Ct. at 1940.[11]

This Court concluded that there is no "precise formula" for making the necessary determinations regarding the amount of attorneys' fee award; however, at all times, the district courts are empowered with the wide discretion to make the necessary close judgments which may be necessary in this context. 76 L.Ed.2d at 52, 103 S.Ct. at 1941.

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[11] Ironically, this Court also urged litigants, like Petitioners, that:
A request for attorneys' fees should not result in a second major litigation. 76 L.Ed.2d at 53, 103 S.Ct. at 1941.

As a result of *Gagne* and *Hensley*, this Court has fully and unequivocally established the guidelines for determining litigants' entitlement to an amount of attorneys' fee awards under § 1988 guidelines. The court of appeals made its decision based on these guidelines.

In the face of this decisional law, Petitioners inartfully present several grounds for granting their petition. First, the petition claims that "the record in this case fully establishes allegations of discrimination are groundless and without merit." Petition at 9. This is a patently absurd allegation. In truth, the complaint in this action was filed in 1976 and during the next five years, substantial discovery was engaged in by the parties, primarily the Respondents. That discovery produced sufficient factual support to obtain class certification. Indeed, for the period covered by the complaint, those facts established significant statistical variances of applicants' success on the dental licensure exam directly connected with the applicants' race or residency.

Second, the Petition claims the record fails to indicate a violation of civil rights laws. However, as the district court found, Respondents succeeded in eliminating procedures which did not safeguard against discrimination. Furthermore, the Respondents prevailed against *all* Defendants', *i.e.*, all state officials' (individually and in their official capacities, including Petitioners) efforts to obtain dismissal of the case on jurisdictional grounds and for judgment as a matter of law.[12] No trial was ever conducted and therefore no determinations regarding Respondents' allegations were ever made by the district court. Rather, in 1979, immediately after the district court determined that the action should proceed as a class action, *all* parties engaged in substantial, lengthy settlement negotations which resulted in the settlement agreements[13] in this case.

Third, under the guise of something called the "peripheral party" argument, Petitioners allege that they could not properly

[12] *See*, footnote 1, *supra*, with respect to the Eleventh Amendment.

[13] Two interim stipulations primarily concerning restructuring of the dental exam were incorporated in the final Settlement Agreement, Appendix I.

be held liable for an award of attorneys' fees under § 1988. As further demonstrated here, Petitioners were intimately and inextricably involved in the settlement process and the content of the settlement agreement. Indeed, there is no question that without Petitioners' participation and consent, there would have been no settlement, no revisions of the examination process, and no expungement of Respondents' (and their class members') records.

Although ignored by Petitioners, this entire case primarily involves the court of appeals' interpretation of the Settlement Agreement. That Settlement Agreement, as interpreted by the court of appeals, provided class members with substantial monetary and non-monetary relief. A fund of $325,000 was established and distributed among the members of the class.[14] The dental licensing examination as conducted by the State officials in the State of Hawaii was entirely revamped and restructured by Respondents after court approval. A previously subjective and non-anonymous licensure process was transformed into a clean double-blind procedure, with a due process appeal procedure for an unsuccessful examinee. The district court found that these comprehensive and fundamental changes were made only as a direct result of the pending lawsuit by Respondents. All of the changes in the design and licensure process and procedures were negotiated by and as approved of by *all* Defendants and could only have been ordered with the active participation of Petitioners. Also, Respondents, and the class, obtained expungement of any and all failures which they had been issued under the previously non-anonymous system. Under no reasonable interpretation of the record could such significant results achieved by Respondents be termed to reflect a record which establishes that discrimination claims

[14] Under prevailing class action law, Respondents were restricted from negotiating the attorneys' fees contemporaneously with the class action monetary settlement. *Mendoza v. United States, supra, Prandini v. Nat'l Tea Co., supra.* For this reason, none of these monies could be paid for Plaintiffs' attorneys' fees, despite the Ninth Circuit Court's assumption [Appendix A to Petition for Writ at 4a] to the contrary.

were "groundless" or "meritless" or that Petitioners were but "peripheral parties" to the settlement.

Indeed, the information upon which the Petitioners are attempting to rely in their petition (which they wrongly call "the record") is at best unsubstantiated, inadmissible hearsay which the majority of the court of appeals described as follows:

> Judge Choy in dissent concedes that the appellees did (he states "technically") prevail, but argues that the award of attorneys' fees nevertheless would be unjust. In support of this conclusion, the dissent incorporates materials referring to dental examination results achieved after appellants, under the compulsion of this civil rights lawsuit, changed the general examination procedures. The dissent extrapolates from these results, which do not constitute the operative facts of this case, that inferences of discrimination have disappeared. This novel approach would seem to create history, a rationale which judicial philosophy does not normally accept. Appendix A to Petition for Writ at 5a, footnote 2:

Furthermore, under *Gagne* and *Hensley*, this Court has already unequivocally mandated that, for purposes of § 1988, litigants who resolve lawsuits by settlement, are not required to show that they would have prevailed at trial on the merits. To do so would be to undercut the congressional mandate in enacting § 1988, and serve as a strong disincentive to settlement. Stated simply, Petitioners cannot use the attorneys' fee application process as a means of vindicating their defenses on the merits—to permit litigants to do so would be to make a mockery of court approved settlements and proper application of § 1988.

Finally, Petitioners also incorrectly claim that this Court should, because it has not previously done so, determine the liability of "multiple parties" in civil rights litigation for attorneys' fees. Petitioners have offered the same argument throughout of this litigation, *i.e.*, that somehow the Petitioners who control the dental examination and who ultimately control dental

licensure under state law and who, without whose participation a settlement would not have been achieved, would somehow, under federal attorneys' fees law, bear no responsibility as between them and the plaintiffs for an award of attorneys' fees under § 1988. This position ignores the joint and several liability[15] of all of Defendants for an award of attorneys' fees and this position as previously explained, fails to recognize that the Court in *Gagne* has resolved any claim that guidance from the Court is required. The guidance requested by Petitioners is unnecessary and is only an attempt by them to prolong the proceedings in this case and to thereby further delay payment of fees to Plaintiffs and their counsel, fees earned in part because of this very same type of conduct below[16].

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[15] *See, e.g., Riddel v. Democratic Party*, 712 F.2d 165 (5th Cir. 1983); *see generally, Hutto v. Finney*, 437 U.S. 678 (1978).

[16] District Court Judge Wiliam W. Schwarzer who, by the time of the hearing on Plaintiffs' motion for attorneys' fees, had become fully conversant with the case and its parties, recognized that the litigational posture assumed by the State in this case substantially increased the efforts required of Respondents' counsel when he wrote: "Finally, the amount of services required to be rendered by plaintiffs' counsel would have been less had it not been for the stubborn resistance offered by counsel for these defendants [Petitioners herein]." Order on Application for Attorneys' Fees, [Appendix C to Petition for Writ at 19a].

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be DENIED.

DATED: Honolulu, Hawaii, November 30, 1983.

Respectfully submitted,

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(with him on the brief):
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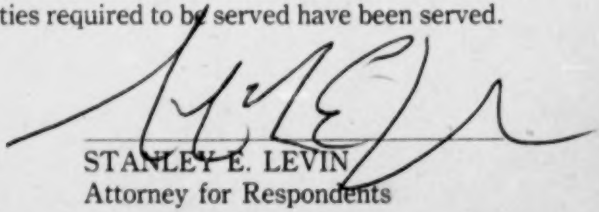
CERTIFICATE OF SERVICE

I hereby certify that on the first day of December, 1983, three copies of the within Respondents' Brief in Opposition were mailed, postage prepaid to Randall Y. Iwase, Esq., Deputy Attorney General, State of Hawaii, State Capitol Building, Honolulu, Hawaii 96813, Counsel for the Petitioners. I further certify that all parties required to be served have been served.



STANLEY E. LEVIN
Attorney for Respondents

APPENDIX

APPENDIX I

In The United States District Court
For The District of Hawaii

Robert L. Pekarsky and Arnie J. Koch, Individually, and on behalf of all others similarly situated, *Plaintiffs,* vs. George R. Ariyoshi, Individually, and in his capacity as Governor, State of Hawaii, *et al.* *Defendants.*	**Civil No. 76-0455** Order Approving Stipulation And Agreement Of Settlement As Final Settlement And Judgment

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
December 15, 1980
at 3 o'clock and 30 minutes, p.m.
WALTER A.Y.H. CHINN, Clerk

ORDER APPROVING STIPULATION AND AGREEMENT OF SETTLEMENT AS FINAL SETTLEMENT AND JUDGMENT

EXHIBIT "A"

The proposed Stipulation and Agreement of Settlement filed herein on November 5, 1980 having come on for hearing of objections to proposed settlement from class members, fair and reasonable notice of proposed settlement having reached

at least 109 of the 131 members of the class and the objections of four class members having been noted by this Court and considered, it is hereby

ORDERED that the Stipulation and Agreement (a copy of which is attached hereto as Exhibit "A") be and hereby is approved, and is hereby entered by this Court as a Final Settlement and Judgment under Rule 23 and Rule 54 of the *Federal Rules of Civil Procedure*, as set forth in its terms incorporated herein.

DATED: Honolulu, Hawaii, December 12, 1980.

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
Judge of the Above-entitled Court

APPROVED AS TO FORM:

/s/ James E. Duffy, Jr.
JAMES E. DUFFY, JR.
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George R. Ariyoshi, Wayne Minami,
and Herbert Chun

EXHIBIT "A"

In The United States District Court
For The District of Hawaii

Robert L. Pekarsky and Arnie J. Koch, Individually, and on behalf of all others similarly situated, *Plaintiffs,* vs. George R. Ariyoshi, Individually, and in his capacity as Governor, State of Hawaii, *et al.* *Defendants.*	**Civil No. 76-0455** Stipulation and Agreement of Settlement

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
November 5, 1980
at 3 o'clock and 25 min. P.M.
WALTER A.Y.H. CHINN, Clerk

Stipulation and Agreement of Settlement

This action was brought by Plaintiffs Pekarsky and Koch, on December 17, 1976, individually and on behalf of all others similarly situated, against defendants, individually and in their various official capacities as they related to licensure to practice dentistry in the State of Hawaii. The action was brought pursuant to 42 U.S.C. §§1981,1982,1983, 1985, and 1986; the

Privileges and Immunities Clause, the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the Fourteenth Amendment to the United States Constitution. The gravamen of the Complaint was that these State officials had utilized the State licensure examination to illegally discriminate against examinees for dental licensure based upon the racial and residential status of the examinees.

Defendants have filed their Answer and denied the allegations of discriminatory use of the dental licensure examination. On May 11, 1979 it was determined that the action would proceed as a class action. Notification to potential class members was carried out pursuant to the order of this Court.

The parties have waived hearings on the merits and findings of fact and conclusions of law as to all claims. This Stipulation and Agreement of Settlement is entered into with the consent of all of the parties without trial or adjudication of any issues of fact or law herein, and without admission by any party with respect to any such issue of act or law, defendants specifically denying liability as to all issues.

Therefore, without any adjudication of any issue of fact or law herein, and with the agreement of all the parties hereto that this Stipulation and Agreement of Settlement binds themselves, their employees, officers, successors, and all persons acting on their behalf, it is hereby

STIPULATED AND AGREED, subject to approval of the Court that:

1. This Court has jurisdiction under 28 U.S.C. §§1343, 1331, and 1337 for the claims herein arising under 42 U.S.C. §§1981, 1982, 1983, 1985, and 1986 over the subject matter of this action and all parties hereto;

2. This Court finds that all the prerequisites of *Fed.R.Civ.P.23* (a) & (b) are met and therefore this action shall be maintained as a class action as established in the Order Granting Plaintiffs' Motion for Determination of the Class

entered on May 11, 1979. That class consists of "all persons who are of Caucasian ancestry or who, at the time of application to defendants for dental licensure, were not residents of Hawaii or were residents of Hawaii for not more than three years, and who were denied dental licensure by defendants after August 1, 1974 and before February 1, 1980."

3. The "Second Interim Stipulation Regarding Changes and Modifications to State of Hawaii Dental Testing and Licensing Procedures; ORDER" and the "Stipulation Memorializing Changes for the February 1980 State of Hawaii Dental Testing and Licensing Procedures and move to; ORDER" approved by the court and filed herein on June 30, 1980 to govern the State of Hawaii dental licensing examinations commencing with the February 1980 examinations are expressly adopted and incorporated herein by reference and shall remain in full effect to the extent that they are not superseded or in conflict with the terms of this Stipulation and Agreement of Settlement.

4. The State of Hawaii and its agents, employees, and officers shall expunge from all records wherever maintained the names and identifying data for all plaintiff class members (whose names and last known addresses are filed concurrently herewith, under seal to prevent public disclosure), so that such names and identifying data are physically removed or deleted from all such records on or before December 31, 1980. All plaintiff class members shall be so notified by first class mail, and advised that pursuant to Order of this Court such expungement has been accomplished and that they may truthfully state that they have not failed a dental licensure examination in Hawaii during the period after August 1, 1974 and before February 1, 1980. The State of Hawaii and its agents, employees and officers shall answer, in response to questions from any source, that no record exists for any plaintiff class member having applied for, taken or failed the Hawaii dental licensure examination during the said period of time. The State of Hawaii shall file a statement with this Court on or before January 31, 1981 that such expungement has been accomplished, the manner and

method(s) by which expungement has been accomplished, that plaintiff class members have been properly notified and that all appropriate State agencies, agents, employees and officers have been instructed in accordance with this paragraph.

5. The amount of $325,000.00 (hereinafter "The Fund") shall be paid by and/or on behalf of Defendants Maehara, Minato, Kurashima, Yang, Shindo, Kahoe, Hirano, and Au within 10 days following entry of the Order approving the settlement.

6. Counsel for plaintiffs and defendants shall designate within 5 days following entry of the Order approving the settlement an Administrator(s) for The Fund, subject to approval of the Court, who shall be responsible for its safekeeping, for accounting of The Fund, and for payments to claimants from The Fund as more specifically set forth below. The Administrator is authorized to deposit and withdraw The Fund monies from time to time into and from interest bearing accounts, certificates and similar instruments.

7. From The Fund so established, payments will be made by the Administrator as follows:

(A) Each class member who submits a verified, approved claim shall receive $2,000.00 for each failed examination during the period after August 1, 1974 and before February, 1980.

(B) For administration of The Fund.

(C) The remainder of the funds will be subject to claims of provable losses of income directly resulting from failure to obtain a license to practice dentistry in Hawaii. Claims for lost income will be subject to review and dispute. Disputed claims will be submitted to final and binding arbitration.

8. If all the claims for lost income [¶7.(C)] exceed the amount of funds left after the payments of $2,000.00 per exam [¶7.(A)] and for administration [¶7.(B)], the remaining sums will be divided among claimants on a pro-rata basis. If all claims to be paid and administrative fees and costs do *not* exceed the amount of funds left, those remaining funds will revert to defen-

dants above-named in paragraph 5.

9. No attorneys' fees will be paid out of The Fund except that administrative costs, including attorneys' fees expended in administration of the settlement will be charged to and paid from The Fund.

10. Procedures for submitting claims will be agreed to by counsel for plaintiffs and defendants within 30 days after entry of the Order approving settlement and will thereafter be mailed to each class member. Claims shall be adjudicated as may be necessary and paid within six (6) months from the closing date for receipt of claims.

11. No damages are to be sought from the remaining defendants: Ariyoshi, Minami, and Chun or the State of Hawaii.

12. There will be a dismissal, with prejudice, as to defendants Maehara, Minato, Kurashima, Yang, Shindo, Kahoe, Hirano and Au following approval by the Court of the settlement.

13. Jurisdiction is retained by this Court for the purpose of enabling all of the parties consenting hereto to apply to this Court at any time for such further orders, reports, and direction as may be necessary or appropriate for the construction or implementation of this Stipulation and Agreement of Settlement, for the modification or termination of any provisions herein, or for the enforcement of compliance therewith and the punishment of violations thereof.

14. This Stipulation and Agreement of Settlement upon approval by the Court becomes a final settlement and judgment under *Fed.R.Civ.P.* 23 and 54 as to all claims for relief asserted or which could have been asserted in this action by any party or class member; the parties agree that there is no just reason for delay and that judgment should be entered accordingly.

15. This settlement shall constitute release by plaintiffs of all claims, and members of the class will be forever barred from making any further claims for damages against defendants aris-

ing out of any matters for which claims were made or could have been made in this action.

16. The matter of plaintiffs' attorneys' fee request against Defendants Ariyoshi, Minami and Chun is reserved for hearing thereon separately on December 1, 1980 by the Court.

DATED: Honolulu, Hawaii, October 24, 1980.

/s/ Evan R. Shirley
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